

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

STEVEN KINFORD,

No. 2:18-cv-01890-RFB-BNW

v.

Plaintiff

SHANNON MOYAL et al.,

Defendants

ORDER

9 Plaintiff, who is in the custody of the Nevada Department of Corrections (“NDOC”),
10 has submitted a second amended civil rights complaint pursuant to 42 U.S.C. § 1983.
11 ECF No. 11. The Court accepts Plaintiff’s second amended complaint (“SAC”) as the
12 operative complaint. The Court now screens Plaintiff’s SAC pursuant to 28 U.S.C. §
13 1915A.

I. SCREENING STANDARD

15 Federal courts must conduct a preliminary screening in any case in which a
16 prisoner seeks redress from a governmental entity or officer or employee of a
17 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
18 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
19 upon which relief may be granted or seek monetary relief from a defendant who is immune
20 from such relief. See 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be
21 liberally construed. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).
22 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
23 (1) the violation of a right secured by the Constitution or laws of the United States, and
24 (2) that the alleged violation was committed by a person acting under color of state law.
25 See West v. Atkins, 487 U.S. 42, 48 (1988).

In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a

1 claim on which relief may be granted, or seeks monetary relief against a defendant who
2 is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure
3 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
4 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
5 reviewing the adequacy of a complaint or an amended complaint. When a court
6 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
7 complaint with directions as to curing its deficiencies, unless it is clear from the face of
8 the complaint that the deficiencies could not be cured by amendment. See Cato v. United
9 States, 70 F.3d 1103, 1106 (9th Cir. 1995).

10 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
11 Chappel v. Lab. Corp. of America, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
12 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
13 support of the claim that would entitle him or her to relief. See Morley v. Walker, 175 F.3d
14 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
15 allegations of material fact stated in the complaint, and the court construes them in the
16 light most favorable to the plaintiff. See Warshaw v. Xoma Corp., 74 F.3d 955, 957 (9th
17 Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than
18 formal pleadings drafted by lawyers. See Hughes v. Rowe, 449 U.S. 5, 9 (1980). While
19 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
20 must provide more than mere labels and conclusions. Bell Atlantic Corp. v. Twombly,
21 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
22 insufficient. *Id.*

23 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
24 that, because they are no more than mere conclusions, are not entitled to the assumption
25 of truth.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). “While legal conclusions can
26 provide the framework of a complaint, they must be supported with factual allegations.”
27 Id. “When there are well-pleaded factual allegations, a court should assume their veracity
28 and then determine whether they plausibly give rise to an entitlement to relief.” Id.

1 "Determining whether a complaint states a plausible claim for relief . . . [is] a context-
2 specific task that requires the reviewing court to draw on its judicial experience and
3 common sense." Id.

4 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
5 *sua sponte* if the prisoner's claims lack an arguable basis either in law or in fact. This
6 includes claims based on legal conclusions that are untenable (e.g., claims against
7 defendants who are immune from suit or claims of infringement of a legal interest which
8 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
9 fantastic or delusional scenarios). See Neitzke v. Williams, 490 U.S. 319, 327-28 (1989);
10 see also McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991).

11 **II. SCREENING OF SECOND AMENDED COMPLAINT**

12 In the SAC, Plaintiff sues multiple defendants for events that took place while
13 Plaintiff was incarcerated at Northern Nevada Correctional Center ("NNCC") and High
14 Desert State Prison ("HDSP"). ECF No. 11 at 1. Plaintiff sues Defendants Shannon
15 Moyal, Warden Bacca, Director Dzurenda, and Hubbard Pickett. Id. at 1-3. Plaintiff
16 alleges two counts and seeks injunctive and monetary relief. Id. at 6-9, 12.

17 The SAC alleges the following: Plaintiff was sexually assaulted by another inmate.
18 Id. at 3. When Plaintiff put up resistance, the other inmate choked Plaintiff out in front of
19 his housing unit. Id. The assailant was put in isolation for a short time. Id. at 6. At some
20 point after the assailant left isolation, he was allowed to work in the same area as Plaintiff.
21 Id. At some point after that, Plaintiff was called into Moyal's office and chewed out for
22 being in the same area as the assailant. Id. at 7. Plaintiff was eventually transferred to
23 a different prison.¹ Id.

24 The SAC further alleges that Plaintiff has well documented medical issues
25 including five surgeries that have occurred since Plaintiff's incarceration. Id. at 8. The
26 surgeries involved putting hardware into Plaintiff's face and leg. Id. Despite the surgeries,

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¹ Prior to his incarceration, Plaintiff was in a severe motorcycle accident, and his memory
28 was impaired. ECF No. 11 at 5. As a result, it is difficult for Plaintiff to remember the
specific dates of the alleged events. Id. at 5-6.

1 Plaintiff continues to have pain and swelling in his face. Id. Plaintiff receives 600 mgs of
2 ibuprofen for the pain. Id. Plaintiff previously received 800 mgs of ibuprofen, which was
3 better at reducing his pain. Id. Plaintiff is still in pain daily. Id.

4 Based on these allegations, Plaintiff brings claims of failure to protect in violation
5 of the Eighth Amendment and deliberate indifference to a serious medical need in
6 violation of the Eighth Amendment. The Court will consider each Count in turn.

7 **A. Failure to Protect**

8 Under the Eighth Amendment, prison officials have a duty to protect prisoners from
9 violence at the hands of other prisoners. Farmer v. Brennan, 511 U.S. 825, 833 (1994).
10 To establish a violation of this duty, the prisoner must establish that prison officials were
11 deliberately indifferent to serious threats to the inmate's safety. Id. at 834. To
12 demonstrate that a prison official was deliberately indifferent to a serious threat to the
13 inmate's safety, the prisoner must show that "the official [knew] of and disregard[ed] an
14 excessive risk to inmate . . . safety; the official must both be aware of facts from which
15 the inference could be drawn that a substantial risk of serious harm exists, and [the
16 official] must also draw the inference." Id. at 837. Prison officials may not escape liability
17 because they cannot, or did not, identify the specific source of the risk; the serious threat
18 can be one to which all prisoners are exposed. Id. at 843.

19 A defendant is liable under 42 U.S.C. § 1983 "only upon a showing of personal
20 participation by the defendant." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). "A
21 supervisor is only liable for constitutional violations of his subordinates if the supervisor
22 participated in or directed the violations, or knew of the violations and failed to act to
23 prevent them. There is no respondeat superior liability under [§]1983." Id.; see also
24 Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) (holding that "[b]ecause vicarious liability is
25 inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-
26 official defendant, through the official's own individual actions, has violated the
27 Constitution").

1 “A showing that a supervisor acted, or failed to act, in a manner that was
2 deliberately indifferent to an inmate’s Eighth Amendment rights is sufficient to
3 demonstrate the involvement—and the liability—of that supervisor.” Starr v. Baca, 652
4 F.3d 1202, 1206-07 (9th Cir. 2011). “Thus, when a supervisor is found liable based on
5 deliberate indifference, the supervisor is being held liable for his or her own culpable
6 action or inaction, not held vicariously liable for the culpable action or inaction of his or
7 her subordinates.” Id. at 1207. As such, “a plaintiff may state a claim against a supervisor
8 for deliberate indifference based upon the supervisor’s knowledge of and acquiescence
9 in unconstitutional conduct by his or her subordinates.” Id.

10 The Court finds that Plaintiff fails to state a colorable claim for failure to protect
11 under the Eighth Amendment. Plaintiff does not allege that any NDOC officials were
12 aware of any risk to Plaintiff prior to the assault. Thus, Plaintiff’s claim for a failure to
13 protect relies on the allegation that at some point after the assault, Plaintiff’s assailant
14 was allowed to work in the same area as Plaintiff. But it is not clear from the SAC whether
15 there was any risk to Plaintiff’s safety at that time. It does not appear that there was any
16 further attack, and the SAC does not provide any details about the situation, such as
17 whether there were guards present to prevent any possible attack.

18 Furthermore, even assuming that there was a substantial risk of harm, Plaintiff
19 does not allege that any of the Defendants were personally aware of and ignored that
20 risk. See Taylor, 880 F.2d at 1045. The only allegation about any of the Defendants in
21 this case was that, at some point after the assault, Moyal yelled at Plaintiff for being in the
22 same area as his assailant. Based on this allegation, it appears that Moyal was not aware
23 of any potential for Plaintiff and his assailant to be in the same area, and Moyal was in
24 fact upset to find out about it. At some point after that, Plaintiff was transferred to a
25 different prison, ensuring that he would not come into contact with his assailant. The
26 allegation that Moyal yelled at Plaintiff after finding out that Plaintiff was in the same area
27 as his assailant is not sufficient to state a colorable claim that Moyal was aware of a risk
28 to Plaintiff’s safety and disregarded the risk. The SAC does not include any allegations

1 about any of the other Defendants. The Court dismisses this claim without prejudice and
2 with leave to amend.

3 **B. Deliberate Indifference to a Serious Medical Need**

4 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
5 and “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity,
6 and decency.’” Estelle v. Gamble, 429 U.S. 97, 102 (1976). A prison official violates the
7 Eighth Amendment when he acts with “deliberate indifference” to the serious medical
8 needs of an inmate. Farmer v. Brennan, 511 U.S. 825, 828 (1994). “To establish an
9 Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the
10 deprivation was serious enough to constitute cruel and unusual punishment—and a
11 subjective standard—deliberate indifference.” Snow v. McDaniel, 681 F.3d 978, 985 (9th
12 Cir. 2012).

13 To establish the first prong, “the plaintiff must show a serious medical need by
14 demonstrating that failure to treat a prisoner’s condition could result in further significant
15 injury or the unnecessary and wanton infliction of pain.” Jett v. Penner, 439 F.3d 1091,
16 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
17 prong, a plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s pain
18 or possible medical need and (b) harm caused by the indifference.” Id. “Indifference may
19 appear when prison officials deny, delay or intentionally interfere with medical treatment,
20 or it may be shown by the way in which prison physicians provide medical care.” Id.
21 (internal quotations omitted). When a prisoner alleges that delay of medical treatment
22 evinces deliberate indifference, the prisoner must show that the delay led to further injury.
23 See Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985)
24 (holding that “mere delay of surgery, without more, is insufficient to state a claim of
25 deliberate medical indifference”).

26 The Court finds that Plaintiff fails to state a colorable claim for deliberate
27 indifference to a serious medical need in violation of the Eighth Amendment. As the Court
28 explained in its first screening order, Plaintiff must allege not only a serious medical need,

1 but that one of the Defendants was aware of his medical need and ignored it. The SAC
2 does not contain any allegations about any of the Defendants involvement with his
3 medical care. Plaintiff appears to allege essentially that his medical needs are clear from
4 his medical files. But this is not sufficient to state a colorable claim against any of the
5 Defendants. The Court dismisses this claim without prejudice and with leave to amend.

6 **D. Leave to Amend**

7 Plaintiff is granted leave to file a third amended complaint to cure the deficiencies
8 of the SAC. If Plaintiff chooses to file a third amended complaint, he is advised that a
9 third amended complaint supersedes (replaces) the original complaint and any previous
10 amended complaints, thus, the third amended complaint must be complete in itself. See
11 Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1546 (9th Cir. 1989)
12 (holding that “[t]he fact that a party was named in the original complaint is irrelevant; an
13 amended pleading supersedes the original”); see also Lacey v. Maricopa Cnty., 693 F.3d
14 896, 928 (9th Cir. 2012) (holding that for claims dismissed with prejudice, a plaintiff is not
15 required to reallege such claims in a subsequent amended complaint to preserve them
16 for appeal). Plaintiff’s third amended complaint must contain all claims, defendants, and
17 factual allegations that Plaintiff wishes to pursue in this lawsuit. Moreover, Plaintiff should
18 file the third amended complaint on this Court’s approved prisoner civil rights form, and it
19 must be entitled “Third Amended Complaint.”

20 The Court notes that If Plaintiff chooses to file a third amended complaint, he must
21 be very clear on how each individual Defendant violated his constitutional rights. It is not
22 sufficient to allege generally that his constitutional rights have been violated, without tying
23 those alleged violations to any of the Defendants. If Plaintiff cannot state a colorable
24 claim in a third amended complaint, the Court will dismiss Plaintiff’s claims with prejudice
25 as further amendment would be futile.

26 If Plaintiff chooses to file a third amended complaint curing the deficiencies, as
27 outlined in this order, Plaintiff will file the third amended complaint within 30 days from the
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1 date of entry of this order. If Plaintiff chooses not to file a third amended complaint curing
2 the stated deficiencies, this action will be dismissed for failure to state a claim.

3 **III. CONCLUSION**

4 For the foregoing reasons, **IT IS ORDERED** that the Clerk of the Court send
5 Plaintiff a courtesy copy of the second amended complaint. ECF No.11. This is the
6 operative complaint in this case.

7 **IT IS FURTHER ORDERED** that Count I, alleging failure to protect under the
8 Eighth Amendment, is dismissed without prejudice and with leave to amend.

9 **IT IS FURTHER ORDERED** that Count II, alleging deliberate indifference to
10 Plaintiff's serious medical needs under the Eighth Amendment, is dismissed without
11 prejudice and with leave to amend.

12 **IT IS FURTHER ORDERED** that Defendants Moyal, Bacca, Dzurenda, and
13 Hubbard Pickett, are dismissed without prejudice.

14 **IT IS FURTHER ORDERED** that, if Plaintiff chooses to file a third amended
15 complaint curing the deficiencies of the second amended complaint, as outlined in this
16 order, Plaintiff will file the third amended complaint within 30 days from the date of entry
17 of this order.

18 **IT IS FURTHER ORDERED** that, If Plaintiff cannot state a colorable claim in a third
19 amended complaint, the Court will dismiss Plaintiff's claims with prejudice as further
20 amendment would be futile.

21 **IT IS FURTHER ORDERED** that the Clerk of the Court will send to Plaintiff the
22 approved form for filing a § 1983 complaint and instructions for the same. If Plaintiff
23 chooses to file a third amended complaint, he should use the approved form and he will
24 write the words "Third Amended" above the words "Civil Rights Complaint" in the caption.

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1 **IT IS FURTHER ORDERED** that, if Plaintiff fails to file a third amended complaint
2 curing the deficiencies outlined in this order, this action will be dismissed with prejudice
3 for failure to state a claim.

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5 DATED THIS 20th day of November 2019.



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7 RICHARD F. BOULWARE, II
8 UNITED STATES DISTRICT JUDGE

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